

# Decision Notice

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## Decision 027/2016: Mr Tommy Kane and the Scottish Ministers

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### Financial support for Ineos

Reference No: 201500808

Decision Date: 5 February 2016



Scottish Information  
Commissioner

## Summary

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On 23 January 2015, Mr Kane asked the Ministers for correspondence with Ineos about any financial support they had given Ineos or about other funding Ineos could access.

The Ministers disclosed some information on review, but withheld other information, on the basis that disclosure would substantially prejudice the effective conduct of public affairs. Following an investigation, the Commissioner agreed that the Ministers had been entitled to withhold the remaining information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 23 January 2015, Mr Kane made a request for information to the Ministers. He asked for:
  - (i) *correspondence between Fergus Ewing MSP (or any other Scottish Government Minister) with Ineos in relation to financial support given to Ineos by the Scottish Government or about financial support that Ineos could access from Scottish Government agencies or from any other funding stream; and*
  - (ii) *correspondence between any Scottish Government official with Ineos in relation to financial support given to Ineos by the Scottish Government or about financial support that Ineos could access from Scottish Government agencies or any other funding stream.*

*Mr Kane asked for correspondence from 1 March 2013 to 23 January 2015.*

2. The Ministers responded on 2 March 2015. They withheld the information covered by Mr Kane's request under sections 30(b)(ii) (Prejudice to effective conduct of public affairs) and 38(1)(b) (Personal information) of FOISA.
3. On 6 March 2015, Mr Kane wrote to the Ministers requesting a review of their decision. He considered it was in the public interest for the information to be disclosed.
4. The Ministers notified Mr Kane of the outcome of their review on 13 April 2015. They substituted their original decision and disclosed redacted copies of the three emails they considered fell within the scope of Mr Kane's request. The information was withheld under sections 30(c) and 38(1)(b) of FOISA.
5. On 30 April 2015, Mr Kane wrote to the Commissioner and applied for a decision in terms of section 47(1) of FOISA. He was not satisfied that the Ministers had identified all of the information falling within the scope of his request. He also argued that the public interest favoured disclosure.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Kane made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 1 June 2015, the Ministers were notified in writing that Mr Kane had made a valid application. They were asked to send the Commissioner the information withheld from Mr Kane. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and were asked to justify their reliance on the exemptions in section 30 and 38 of FOISA. They were also asked for details of the searches they had carried out to locate any information falling within the scope of Mr Kane's request.
9. Mr Kane was asked if he had any further submissions he wished to provide.
10. The Ministers provided the investigating officer with their submissions on 4 August 2015.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Kane and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### *The withheld information*

12. The Ministers provided Mr Kane with redacted versions of three emails. They applied section 30(c) of FOISA to all of the redacted information and, in addition, applied section 38(1)(b) of FOISA to the names, telephone numbers and email addresses of the officials who had sent or received the emails. Mr Kane told the Commissioner that he did not require the telephone numbers or email addresses of the officials, so these will not be considered in this decision.
13. Before going on to consider whether the exemptions apply, the Commissioner will consider whether the Ministers identified all of the information falling within the scope of Mr Kane's requests.

### *Do the Ministers hold any further information?*

14. The investigating officer asked the Ministers to explain the searches they had carried out to ascertain what information they held.
15. The Ministers explained that the request handler had completed an initial search of the Scottish Government's corporate information system (eRDM) to identify any documents which would potentially fall within the scope of the request. This initial search was carried out using the keyword "Ineos". A line-by-line search was undertaken of specific folders on the system which contained documents pertaining to Scottish Government interactions with Ineos.
16. Searches were not limited to the eRDM. The officials in the Energy & Climate Change Directorate (which is responsible for policy on unconventional oil and gas), the Resilience Division, the Environment Directorate and the Planning and Architecture Directorate, who

would have been likely to have seen any correspondence on funding for Ineos, were asked whether they held information outside of the eRDM folders. The Ministers provided the investigating officer with a copy of the request sent to the officials and identified where nil responses were received.

17. At review stage, the Ministers also carried out further searches of the eRDM files using a range of keywords. No additional information was identified.
18. During the investigation, the investigating officer asked the Ministers to carry out further searches and suggested specified search terms the Ministers should use. The Ministers carried out the searches, but they did not locate any further information which fell within the scope of the request.
19. The Ministers re-ran their original searches, but found no further information within the scope of the request. The Ministers explained that the use of individual search terms at both request and review, such as 'Ineos' and 'fracking', had returned a large number of documents. However, these included a significant number of documents which were not relevant to Mr Kane's request. The Ministers said this was a reflection of the fact that the Scottish Government engagement on these matters had been on-going for a number of years and involved a large number of policy areas.
20. Apart from the three emails which had originally been identified, none of the correspondence with Ineos during the period covered by the request had anything to do with financial support for the company.
21. The Ministers commented that, as Mr Kane's request was very specific in nature, the request handler had a good idea of what information the Ministers held and focused searches on the individual business areas and officials most likely to hold information about financial support. Using this specific subject knowledge, the request handler had completed a trawl through the specific folders on the system to isolate the relevant information.
22. The Commissioner has considered the relevant submissions and has also taken account of the specific wording of Mr Kane's request. It is apparent that this is limited to information relating specifically to Ineos' financial support. She accepts that the Ministers carried out adequate, proportionate searches to ascertain what information was held. She is satisfied, on balance of probabilities, that the Ministers do not hold any further information falling within the scope of the request.

### **Section 30(c) - Prejudice to effective conduct of public affairs**

23. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
24. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice in question must be substantial and of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, and not simply that such prejudice is a remote or hypothetical possibility. Each request should be

considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

25. In relation to the information redacted from the three emails, the Ministers submitted that it was essential for officials to be able to communicate, often in confidence, with external stakeholders such as Ineos on a range of issues, including issues of an operational or financial nature. Disclosing the full content of these communications, particularly without consent, would, in their view, be likely to undermine stakeholders' trust in the Scottish Government and would substantially inhibit future communications on this type of issue. The Ministers were of the view that Ineos would be reluctant to provide their views fully and frankly either in writing or in meetings if they believe that their views were likely to be made public.
26. The Ministers stated that they considered it necessary to engage in discussions on the future development of a whole range of matters in relation to Ineos, and to engage in discussions to ensure that they were engaging in work that was in the interests of the people of Scotland. Additional submissions were also provided by the Ministers, but the Commissioner is unable to summarise them here without, in effect, disclosing information which the Ministers consider to be exempt from disclosure.
27. The Ministers withheld the names of the officials in the emails under this exemption. The Ministers commented that Mr Kane's job gave him access to the Scottish Government staff directory. This meant it would be possible for him or his colleagues to ascertain what policy areas these officials worked in and, as a result, guess what types of proposals were being discussed.
28. Having considered the nature and content of the withheld information, and the submissions provided, the Commissioner accepts that disclosing the information (including the names of the officials) would be likely to cause substantial prejudice to the effective conduct of public affairs, given the need for open and productive discussions between the Government and stakeholders in such a sensitive area as oil and gas extraction.
29. The Commissioner therefore accepts that the Ministers were entitled to apply the exemption in section 30(c) of FOISA to the withheld information.
30. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

### **The public interest test**

#### *The Ministers' submissions*

31. The Ministers acknowledged that there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. They also acknowledged the public interest in relation to the operations of Ineos.
32. However, they believed that there was a greater public interest in allowing Ministers and officials a private space within which to communicate as part of the process of exploring and refining their position on the operations of Ineos until the Government could adopt a decision. Such private space was essential, the Ministers stated, to enable all options to be properly considered in confidence with Ineos, so that good decisions could be taken based on fully informed advice and evidence, such as that provided by Ineos staff.

33. The Ministers were of the view that premature disclosure would be likely to undermine the full and frank discussion of issues between the Scottish Government and these stakeholders. This would undermine the quality of the decision making process and would not be in the public interest. Neither would it be in the public interest, the Ministers submitted, to damage their relationships with such an important stakeholder or to put that stakeholder off exploring options which could ultimately significantly benefit the Scottish economy as well as benefitting Ineos.

*Mr Kane's submissions*

34. Mr Kane was of the view that there was a wide public interest in the mutual relations, discussions and advice between Ineos and the Ministers, particularly to show whether Ineos was using its economic strength, and its recognised importance to the wider Scottish economy, in order to negotiate for public funding to further its plans for fracking in Scotland.

*The Commissioner's conclusions*

35. The Commissioner accepts there is a general public interest in transparency and accountability, particularly in areas involving spending from the public purse. She also accepts the importance of transparency and accountability in relation to sensitive environmental issues such as the potential extraction of oil and gas, both to allow effective scrutiny and to reassure the public where appropriate.
36. Nevertheless, the Commissioner must also acknowledge the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the effect of disclosure on the relationship of openness and confidence between the Ministers and their stakeholders. Furthermore, the Commissioner is of the view that disclosing the names of Ministerial staff in the emails, when coupled with Mr Kane's own position, could be detrimental in allowing assumptions to be made, whether rightly or wrongly, as to the relevance of their various departments to the discussions being undertaken. (The Ministers have disclosed the name of the only Ineos staff member involved in the email discussions.)
37. On balance, having taken account of all the submissions before her, the Commissioner is of the view that the public interest in withholding the information outweighs that in disclosing it.
38. The Commissioner therefore finds that the Ministers were entitled to withhold the information under section 30(c) of FOISA. As the Commissioner has determined that the Ministers were entitled to withhold the names of the Ministerial staff members under this exemption, she is not required to consider the application of section 38(1)(b) of FOISA to the same information.

## **Decision**

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The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Kane.

## **Appeal**

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Should either Mr Kane or the Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**05 February 2016**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that -

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



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